In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 896

ALAMO EXPRESS, INC. AND ALAMO CARTAGE COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet officially reported. The Board's decision and order are reported at 170 NLRB No. 26 (A. 1015–1058).[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a–11a) was entered on August 6, 1970. The petition for a writ of certiorari was filed on October 24, 1970.

[1] "A." references are to the printed appendix to the briefs in the court below.

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The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer's discharge of two employees, who refused to cross a lawful picket line at the premises of another employer in order to pick up merchandise, violated Section 8(a)(1) and (3) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 11a–12a.

STATEMENT

Alamo Express, Inc. and Alamo Cartage Company constitute a single, integrated enterprise (the "Company") engaged in the intrastate trucking of freight in Texas (A. 1015–1016). The Company, after objecting (A. 683–686) to an NLRB election which resulted in the Union (General Drivers, Warehousemen and Helpers Local Nos. 968, 957, and 490) being certified as the representative of the Company's employees, refused to bargain with the Union (A. 1017–1019, 1050–1054). In subsequent proceedings, the Board concluded that the Company's refusal violated Section 8(a)(5) and (1) of the Act. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Perez and Fonteno because of their union activity (A. 1020–1024,

1029–1035, 1055–1056), and employees Rodney and Jefferson because of their refusal to cross a picket line (A. 1036–1038). It ordered the Company, *inter alia*, to bargain upon request with the Union and to reinstate the four employees with backpay (A. 1046). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a–9a). This petition only challenges that part of the order relating to the two employees who refused to cross the picket line (Pet. 2–3). The relevant facts respecting that issue are as follows:

Rodney and Jefferson were employed as pickup and delivery drivers at the Company's Houston terminal. Rodney was active in efforts to organize the Company and had served as a Union observer in the Board election (A. 1036). On July 28, 1966, he was instructed by his foreman to make a pickup at the premises of Southwestern Pipe Company in Houston (A. 1036; 771–772). When he arrived he saw a group of pickets, and, upon ascertaining that they were striking against Southwestern, he advised Company Vice-President Walker by telephone that he would not cross the picket line (A. 1036; 773–774). Walker responded that, "if a man can't cross a picket line, I can't use him," and indicated that Rodney was fired (*ibid.*). Rodney then returned to the terminal, where Walker confirmed his discharge and stated that it was Alamo's policy to require its employees to cross picket lines (A. 1036; 774).

Soon thereafter, the night foreman ordered Jefferson to make the pickup at Southwestern, but did not

mention the picket line or Rodney's discharge (A. 1036; 816–817). When Jefferson arrived at Southwestern's plant, he saw the picket line, investigated, and was told that another Alamo driver had previously refused to cross the line that same day (A. 1036; 817–818). Jefferson called the terminal to advise that he would not cross the picket line, but was told by his foreman and the night manager that he must. When Jefferson persisted in his refusal, he was ordered to return to the terminal. He did so, and was discharged by the terminal manager who stated, "[a]s long as you work for Alamo you have to cross the picket line." (A. 10.37; 819).

The Board concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging Rodney and Jefferson. It held that refusing to cross the picket line at Southwestern was protected concerted activity within the ambit of Section 7 of the Act (Pet. App. 11a), and that the Company had not established an overriding business justification for abridging the employees' Section 7 right. Rejecting the Company's contention that it was essential to the operation of its business to discharge the two drivers, the Board found that other drivers could have been dispatched to make the pickup without revision of the Company's policy, and that any resultant inconvenience to the Company was insufficient to outweigh the employees' countervailing right to engage in concerted, protected activity. The Board further noted that the discharges occurred in the context of Company hostility to union activity

and that the Company had unlawfully discharged other employees to discourage unionization (A. 1038). The court of appeals affirmed the Board's findings and conclusion, adding that there was no evidence that either Rodney or Jefferson were eventually replaced by employees willing to cross the picket line, nor was there any showing that their skills were such that no one could replace them (Pet. App. 8a–9a).[2]

ARGUMENT

Employees who refuse to cross a picket line at another employer's premises are engaged in activity protected by Section 7 of the Act; nevertheless, they may be lawfully discharged if their employer acts "only to preserve efficient operation of his business, and * * * only so [that he] could immediately or within a short period thereafter replace them with others willing to perform the scheduled work * * *." See *Redwing Carriers, Inc.*, 137 NLRB 1545, 1547, enforced *sub nom. Teamsters Local 79* v. *National Labor Relations Board*, 325 F.2d 1011 (C.A. D.C.), certiorari denied, 377 U.S. 905, and *Overnite Transportation Company*, 154 NLRB 1271, 1274, enforced *sub nom. Truck Drivers and Helpers Local No. 728* v. *National Labor Relations Board*, 364 F.2d 682 (C.A. D.C.). "[W]hat is required is the balancing of two opposing rights, and it is only when the

[2] On October 23, 1970, Mr. Justice Black denied the Company's application for Recall and Stay of Mandate pending the filing and disposition of its petition for a writ of certiorari.

employer's business need to replace the employees is such as clearly to outweigh the employees' right to engage in protected activity that an invasion of the statutory right is justified" (154 NLRB at 1274).

Petitioner does not challenge here the validity of these principles,[3] but basically argues that "the Board and the Court failed to take into consideration pertinent facts which weigh heavily in favor of the Employer when balancing the employee's activity against the Employer's specific business interests" (Pet. 5). This contention raises only an evidentiary issue which has little significance beyond the case at bar, and does not warrant review by this Court.

Furthermore, the Board's conclusion that petitioner failed to show that the discharges of Rodney and Jefferson were motivated by "legitimate and substantial business justifications" (*National Labor Relations Board* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 380) is correct. The vague testimony relied on by the Company (Pet. 7, citing A. 945–946) that new drivers (whom the witness could not name) were hired after

[3] See also *National Labor Relations Board* v. *Swain and Morris Construction Co.*, 74 LRRM 3037 (C.A. 9), No. 23809, August 6, 1970. In *National Labor Relations Board* v. *Rockaway News Supply Co.*, 345 U.S. 71, the Court did not pass on these principles because it found that any right the employee there possessed to cross a picket line had been waived by his bargaining agent in the no-strike clause of its contract with the employer (pp. 79–81).

Rodney and Jefferson were discharged scarcely establishes that these two employees were terminated so as to make way for replacements who were willing to cross the Southwestern picket line. Moreover, it is apparent that the Company's "underlying hostility to the Union" (Pet. 9a) was a significant factor in the discharges. As the court below emphasized, not only was the Company aware that Rodney had engaged in pro-union activities, but also its strong anti-union animus had been manifested by the discriminatory discharges of two other employees, the unlawful refusal to recognize and bargain with the Union, and the statement of a Company vice-president that "[i]f a man can't cross a picket line, I can't use him" (Pet. 9a).

There is no merit to the Company's contention that, as a common carrier, it "must have the right to discipline employees who refuse to perform services compatible with [its] imposed obligation" (Pet. 9). Neither the statute nor the cases cited by petitioner hold that a common carrier breaches its "imposed obligation" when it is unable to provide service because its employees choose to exercise their Section 7 rights under the National Labor Relations Act. See *General Drivers, Local Union No. 89* v. *American Tobacco Co.*, 348 U.S. 978, reversing 264 S.W. 2d 250 (Ky. Ct. App.); *Local 1976, Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 108–111.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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